IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORIGINAL SIDE

APPEAL NO.394 OF 2004
IN
NOTICE OF MOTION NO.447 OF 2004
IN
SUIT NO.1027 OF 1996

Ramniranjan Kedia Tourism Services Pvt.Ltd. Appellant
(original Plaintiff)

vs.

Airports Authority of India Respondent no.1
(original Defendant no.1)

And

Syndicate Bank Respondent no.2.
(original Defendant no.2)

Mr.Birendra Saraf i/b. M/s. Makhijani & Co. for the appellant.

Mr.P.K.Samdani i/b. M/s.Bhaishankar Kanga & Girdharlal for the respondent no.1

**CORAM : R. M. LODHA &**
**J.P. DEVADHAR,JJ**.

**DATED : 9th August 2004**

**P.C.**

Heard.

2. The plaintiff is in appeal before us aggrieved by the order dated 5th March 2004 passed by the learned trial Judge. By the said order, the learned trial Judge set aside the order passed by the Prothonotary and

Senior Master transferring the plaintiff's suit to the list of undefended suits and the written statement filed by the first defendant was taken on record.

3. The learned counsel for the first respondent (first defendant) raised preliminary objection about the maintainability of appeal. He submitted that the impugned order is an order interlocutory in nature. According to the learned counsel, the impugned order is not a 'judgment' within the meaning of clause 15 of Letters Patent. He placed reliance upon the judgment of the Supreme Court in the case of Shah Babulal Khimji v. Jayaben D. Kania, A.I.R. 1981 S.C.1786.

4. The learned counsel for the appellant on the other hand submitted that the appeal was maintainable as the impugned order was legally erroneous and if allowed to stand would cause grave and substantial injustice to the appellant.

5. The appellant ('the plaintiff') filed the suit against the first respondent ('the defendant no.1') seeking diverse reliefs. It appears that on 6th September 2001 the matter was placed before the Prothonotary & Senior Master as no written statement was filed. The matter was adjourned for eight weeks for filing written statement. No written statement was

filed by the first defendant and again on 1st November 2001 the matter was adjourned to 10th January 2002 by the Prothonotary & Senior Master for filing written statement. On 10th January 2002 the following order came to be passed by the Prothonotary & Senior Master:

> "No written statement is filed by the defendant no.1 though time was sought on the earlier occasion. Suit as against defendant no.1 transferred to the list of undefended suits. To be on board after two weeks.
>
> Adjourned for two weeks for ascertaining whether defendant no.2 has been served or not."

6. It appears that on 14th October 2003 the suit was posted before the trial Judge which was adjourned and then a notice of motion was taken out by the advocates for the first defendant on 11th February 2004 praying therein that the minutes of the order dated 10th January 2002 for transferring the suit to the list of undefended suits be set aside and the defendant no.1 be granted leave to file its written statement. An affidavit by one Shripad M. Khasnis, managing clerk of the advocates for the first defendant was sought to be relied upon in support of the notice of motion.

7. The said notice of motion was contested by the plaintiff on diverse grounds. The learned trial Judge

was of the view that the delay in filing the written statement deserved to be condoned and an opportunity deserved to be given to the first defendant for filing written statement. It was observed by the learned trial Judge that the written statement was lying with the solicitor firm representing the first respondent and the party must not be made to suffer on account of negligence on the part of the solicitor firm. The trial Judge, accordingly, set aside the order of the Prothonotary and Senior Master on 10th January 2002 and directed that written statement of the first defendant be taken on record on payment of cost of Rs.2500/-.

8. The order, such as this, passed by the trial Judge, we are afraid, cannot fall within the scope, meaning and purport of the expression "judgment" under clause 15 of the Letters Patent. In Shah Babulal Khimji, the Supreme Court in paragraphs 110, 111, 114, 117 and 119 observed thus:

> "110. In Mt. Shahzadi Begam v. Alakh Nath, AIR 1935 All 620 (2) (FB), Sulaiman C.J., very rightly pointed out that as the Letters Patent were drafted long before even the Code of 1882 was passed, the word 'judgment' used in the Letters Patent cannot be relatable to or confined to the definition of 'judgment' as contained in the Code of Civil Procedure which came into existence long after the Letters Patent were given. In this connection, the Chief Justice observed as follows:-

"It has been held in numerous cases that as the Letters Patent were drafted long before even the earlier Code of 1882 was passed, the word 'judgment' used therein does not mean the judgment as defined in the existing Code of Civil Procedure. At the same time the word 'judgment' does not include every possible order, final, preliminary or interlocutory passed by a Judge of the High Court."

111. We find ourselves in complete agreement with the observations made by the Allahabad High Court on this aspect of the matter.

114. In the course of the trial, the trial Judge may pass a number of orders whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to one party or the other, e.g., an order refusing an adjournment, an order refusing to summon an additional witness or documents, an order refusing to condone delay in filing documents after the first date of hearing, an order of costs to one of the parties for its default or an order exercising discretion in respect of a procedural matter against one party or the other. Such orders are purely interlocutory and cannot constitute judgments because it will always be open to the aggrieved party to make a grievance of the order passed against the party concerned in the appeal against the final judgment passed by the trial Judge.

117. Let us take another instance of a similar order which may not amount to a judgment. Suppose, the trial Judge allows the plaintiff to amend the plaint by adding a particular relief or taking an additional ground which may be inconsistent with the pleas taken by him but is not barred by limitation and does not work serious injustice to the defendant who would have ample opportunity to disprove the amended plea taken by plaintiff at the trial. In such cases, the order of the trial Judge would only be a simple interlocutory order without containing any quality of finality and would therefore not be a judgment within the meaning of clause 15 of the Letters Patent.

119. Apart from the tests laid down by Sir White, C.J. the following considerations must prevail with the Court:

(1) That the trial Judge being a senior court with vast experience of various branches of law occupying a very high status should be trusted to pass discretionary or interlocutory orders with due regard to the well settled principles of civil justice. Thus, any discretion exercised or routine orders passed by the trial Judge in the course of the suit which may cause some inconvenience or, to some extent, prejudice one party or the other cannot be treated as a judgment otherwise the appellate Court (Division Bench) will be flooded with appeals from all kinds of orders passed by the trial Judge. The courts must give sufficient allowance to the trial Judge and raise a presumption that any discretionary order which he passes must be presumed to be correct unless it is ex facie legally erroneous or causes grave and substantial injustice.

(2) That the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

(3) The tests laid down by Sir White, C.J. as also by Sir Couch, C.J. as modified by later decisions of the Calcutta High Court itself which have been dealt with by us elaborately should be borne in mind."

9. In our considered view, the impugned order is in the nature of an interlocutory order and does not decide rights of the parties finally or interlocutorily. The impugned order cannot be said to have any traits and/or trappings of finality of deciding any question; it only affords an opportunity to the first defendant to file written statement. We do not agree with the learned

counsel for appellant that the impugned order has caused grave and substantial injustice to the plaintiff. Rather, if such order had not been passed, it would have occasioned in failure of justice to the first defendant.

10. Even if we assume that the impugned order is a 'judgment' under clause 15 and is appelable, in our considered view, the order advances the cause of justice and warrants no interference by us in appellate jurisdiction.

11. The appeal is, accordingly, dismissed in limine.

**(R.M. LODHA, J.)**

**(J.P. DEVADHAR,J.)**